

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

CAPITOL STREET SURGERY CENTER, LLC)	
)	
and)	Case: 25-CA-271204
)	
MARTIN LAUSTER, an Individual)	

RESPONDENT'S POST-HEARING BRIEF

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I. INTRODUCTION

Following a three-day hearing on the merits before the Honorable Elizabeth M. Tafe, the General Counsel simply failed to meet her burden to prove that Charging Party, Martin Lauster (“Lauster”), was discharged by Respondent, Capitol Street Surgery Center (“CSSC”), because he engaged in protected concerted activity. An interventional radiology technologist (“IR Tech”) working in a surgery center treating primarily seriously ill kidney dialysis patients in procedures requiring the use of a specialized x-ray equipment known as a C-Arm, Lauster had a history of work performance issues, including being distracted/not paying attention during surgery, needing to be reminded of requests/not following the physician’s directions, dropping supplies, doodling on the tray, not learning the correct room setup, and being overly chatty/joking around during procedures. These issues caused significant concerns for the interventional radiology doctor, the Lead IR Techs, the other clinical staff, and the surgery center Administrator, Brandon Ehret (“Ehret”).

On November 18, 2020, the Lead IR Techs observed similar behaviors that they reported to Ehret that same day. One lead IR Tech reported that she observed Lauster making hand puppets with an emergency flashlight during a procedure and then setting up the room incorrectly for another case. The other Lead IR Tech reported that she saw Lauster shining the emergency flashlight in the eyes of the nurse who was actively monitoring the sedated patient’s vital signs during a procedure. Following these two reports, and given Lauster’s overall performance history of similar types of behaviors, Ehret made the decision to discharge Lauster, an at-will employee, that same day. This was similar to what had happened with two other at-will employees, neither of whom had any prior history of documented work performance issues, and both of whom (like Lauster) were summarily discharged by Ehret for their overall performance shortcomings.

Notwithstanding the overwhelming evidence supporting the legitimate, nondiscriminatory reasons for his discharge, Lauster speculates that he must have been terminated because of a brief conversation that occurred during a staff meeting two weeks earlier, on November 5, 2020, dealing primarily with inventory control issues. In that meeting, when the topic of running the C-Arm in early cases arose, Lauster noted that a nurse could not run the C-Arm, and another IR Tech clarified that there was a law which dictated which job classifications (IR Techs and physicians) could actually “push the button” to dispense the radiation. The IR Tech who made those statements was not disciplined in any way, nor were any of the other IR Techs who participated in this discussion. It is undisputed that Ehret knew nothing of what Lauster said during that meeting, and those statements had no impact at all on what the Lead IR Techs reported to Ehret on November 18 or on Ehret’s decision to part ways with Lauster.

In short, the General Counsel has failed to proffer any evidence of animus on the part of Ehret (or on the part of the Lead IR Techs, for that matter) based upon anything that Lauster said during the November 5 meeting, nor has she established any causal connection between his few statements in that meeting and his ultimate discharge based upon what the Lead IR Techs reported to Ehret that day. And even if she could establish a *prima facie* case, she offers no credible evidence of pretext to undermine CSSC’s legitimate, nondiscriminatory explanation for Ehret’s decision to part ways with Lauster due to his continued poor performance and behavior.

In an apparent eleventh hour attempt to save her case, the General Counsel added a *Johnnie’s Poultry* claim mid-way through the second day of trial, challenging Ehret’s request that another IR Tech, Cassandra Shepard (“Shepard”), provide him with a copy of an audio transcript of the November 5 meeting that she had made. Notwithstanding the General Counsel’s new claim that Ehret “forcefully interrogated” her when he asked her for the recording, Shepard testified that Ehret was “the best supervisor she ever had” and that she in no way felt intimidated or coerced by

this request. To the contrary, she was happy to oblige. The General Counsel has failed to meet her burden to prove that the *Johnnie's Poultry* safeguards applied to this interaction, and even if they did, there was no violation given the totality of the circumstances.

II. SUMMARY OF EVIDENCE

A. Capitol Street Surgery Center Background

Capitol Street Surgery Center is an outpatient surgery center specializing in orthopedic, GYN, plastics, pain management, and interventional radiology surgeries. (Tr. at 21:18-24, 151:22-152:2.) CSSC has about 25 employees, including office workers, registered nurses, certified scrub techs, sterile processing, and Interventional Radiology Technologists (“IR Techs”). (Tr. at 21:25-22:24, 551:2-14.) The interventional radiology surgeries – procedures specializing in patient vein and artery health (Tr. at 408:1-23) – are performed by Dr. Mohindra. (Tr. at 155:18-22.) Dr. Mohindra is not employed by CSSC. (Tr. at 550:16-22.) Dr. Mohindra and the interventional radiology department average 8 to 15 surgeries performed in two of the center’s four operating rooms. (Tr. at 114:22-115:4, 316:22-24.) The typical patient obtaining interventional radiology surgeries has end stage renal disease. (Tr. at 156:12-16.) The patients’ overall poor health, and the fact that they are under sedation, increases the risks and heightens the need for patient safety during these procedures. (Tr. at 364:24-365:3.) Patient safety is CSSC’s number one priority. (Tr. at 377:17-23.)

Brandon Ehret, who has been the Administrator of CSSC since August 2018, manages the day-to-day operations of the surgery center. (Tr. at 21:4-22:6, 548:5-12.) This includes oversight of personnel, surgeon interactions, compliance with regulations, and generally operating the business. (Tr. at 22:7-12.) As Administrator, Ehret maintains authority over, and responsibility for, hiring, firing, discipline, and setting rates of pay. (Tr. at 23:15-24, 79:4-7.)

B. CSSC Hires Martin Lauster

CSSC hired Martin Lauster on February 6, 2019, as an IR Tech. (Tr. at 51:17-23, 112:24-113:2.) An IR Tech's job duties include assisting in the care of surgical patients in the operating room by utilizing x-ray equipment and supplies, functioning as an efficient member of the surgery team, adherence to principles of aseptic (sterile) techniques, and developing community skills that promote departmental relationships. (Tr. at 26:13-22, 153:11-21, GC Ex. 3.) CSSC's interventional radiologist, Dr. Mohindra, performs five types of surgeries, each one requiring a unique room and patient setup. (Tr. at 54:9-55:5.) IR Techs are expected to memorize the correct room setup for each type of surgery. (Tr. at 54:9-55:5, 155:15-156:4, 413:5-414:6.) All IR Techs are informed that they should be focused on the needs of the patient during surgeries. (Tr. at 415:23-416:9.) Lead IR Techs have the same job description and perform the same duties as IR Techs, and they also provide clinical oversight and feedback on how the IR Techs perform during surgeries. (Tr. at 412:18-413:4.)

The x-ray equipment the IR Techs operate, known as the "C-Arm," is a fluoroscopic radiation emitting machine that takes images similar to an x-ray. (Tr. at 111:5-25, 228:21-229:10.) Lauster believes that only those employees possessing a state registration and a professional certification from the American Registry of Radiologic Technologists can even touch the C-Arm, and that the physician is not allowed to do so without special training. (Tr. at 112:1-17, 176:24-178:2.) CSSC believes that any employee can "run" the C-Arm – meaning move or push it into position – but that only physicians and IR Techs can "operate" the C-Arm – meaning push the button or foot pedal to emit radiation and take the x-ray image. (Tr. at 44:5-21.)

During an interventional radiology procedure, Dr. Mohindra, nurses, and IR Techs are all present in the operating room. (Tr. 27:12-15, 153:25-155:4.) Dr. Mohindra performs the surgery, one IR Tech is first assist to Dr. Mohindra, another IR Tech operates the C-Arm, one nurse

monitors patient vitals, and another circulating nurse ensures that the physician has the tools and supplies needed for the case. (Tr. at 337:11-17, 350:18-23.) For these surgeries, Dr. Mohindra and the first assist IR Tech are “scrubbed in,” which requires that they maintain sterility to combat the spread of bacteria or infection during the operation. (Tr. 153:25-155:4, 354:20-355:14, 411:4-19.) If not scrubbed in or operating the C-Arm for a particular procedure, the Lead IR Techs also float between operating rooms to offer assistance where needed. (Tr. at 190:25-191:5.)

CSSC’s equipment is maintained by the Sterile Processing Department. (Tr. at 162:23-25, 317:11-24.) The Sterile Processing Department’s responsibilities include maintaining and sanitizing the company’s equipment, including testing CSSC’s emergency flashlights that are located in each of the company’s four operating rooms. (Tr. at 317:25-318:17, 348:1-10, 551:11-24.) These emergency flashlights are to be used in case of a power outage so that there is sufficient lighting to conclude the surgery. (Tr. at 551:25-552:5.) There is no clinical reason to use the flashlight, other than during an emergency power outage. (Tr. at 424:5-10, 503:2-4.)

CSSC has an employee handbook that is distributed to all employees, including Lauster. (Tr. at 24:6-22, GC Ex. 2.) The handbook establishes that the employees are at-will, and Lauster understood that he was an at-will employee as well. (Tr. at 149:4-16.) The handbook confirms CSSC’s commitment to equal employment opportunity (GC Ex. 2 at 8), establishes the grievance procedure encouraging employees to raise concerns with their supervisors (GC Ex. 2 at 11), confirms its whistleblower protection policy protecting employees reporting regulatory concerns, and it establishes the company’s opposition to retaliation for whistle blowing. (GC Ex. 2 at 14.) The employee handbook also maintains an employee conduct policy informing employees of its rules against, among other things, boisterous or disruptive activity in the workplace and violation of safety or health rules. (GC Ex. 2 at 27-29.) While CSSC may implement progressive discipline

(such as verbal warnings, written warnings, or suspensions), violation of any of its rules of conduct can lead to immediate termination. (Tr. at 76:5-78:25, GC Ex. 2 at 27-29.)

C. Assessment of Lauster's Job Performance

On December 20, 2019, about ten months into his employment, CSSC gave Lauster an annual performance evaluation, during which evaluation Lauster met with Ehret and the then-Director of Nursing, Shannon Genovese ("Genovese"). (Tr. at 52:8-15, 116:8-117:9, GC Ex. 5.)¹ The evaluation specifically identified an area for future growth and training: "Marty needs to work on being more focused in the procedures by paying attention [and] anticipating the needs of the case [and] physician." (GC Ex. 5 at 2.) Genovese (called as a witness by the General Counsel) stated that she wrote this critique because Lauster was writing during surgeries and needed to be more attentive in procedures. (Tr. at 329:23-330:3, 330:21-331:4.) CSSC presented this performance evaluation to Lauster, and he signed it. (Tr. at 53:10-13.) Despite his room for improvement in this critical area, CSSC gave Lauster "usually meets the standards" checkmarks on the evaluation form because Ehret intended to continue to train Lauster and provide feedback to help improve his performance. (Tr. at 57:25-58:4.) Lead IR Tech, Jennifer Lozano ("Lozano") and Ehret confirmed that Lauster's performance continued to decline after this evaluation. (Tr. at 499:13-19, 590:7-21.) Numerous witnesses corroborated these observations.

For example, his coworker, Lori Harbert ("Harbert"), has worked at CSSC as a registered nurse in the operating and interventional radiology departments since mid-2019. (Tr. at 361:22-362:2, 363:8-364:4.) In this capacity she worked with Lauster for approximately one year, two to three days per week, four to five cases per day. (Tr. at 365:4-15.) Based upon her observations, she described Lauster's performance during surgeries as "distracted," "[h]e got off task easily,"

¹ Ehret was the first witness called during the trial, and he initially believed that Danielle Mohindra prepared and participated in this evaluation. (Tr. at 52:13-53:2). After hearing Lauster's and Genovese's subsequent testimony on this issue, he recalled that Genovese oversaw the evaluation, and he clarified this testimony when called during CSSC's case in chief. (Tr. at 558:3-20.)

“[h]e would squirt the circulators with saline, draw on the table, talk to room staff and be generally distracting.” (Tr. at 365:16-366:2.) Harbert explained that these performance issues occurred routinely during surgical procedures. (Tr. at 366:3-9.) She explained that Lauster’s performance annoyed her at times and made it harder for her to perform her job duties. (Tr. at 366:10-24.)

Another coworker, Kathleen Hunter (“Hunter”), has been a nurse at CSSC since September 2019, and she was promoted to Director of Nursing in February 2020. (Tr. at 373:17- 374:7.) In these roles she works in all types of surgeries, including interventional radiology surgeries with Dr. Mohindra. (Tr. at 375:13-376:16.) Like Harbert, she worked alongside Lauster for more than a year, two or three days a week, four to five cases per day. (Tr. at 377:24-378:16.) Based upon her observations, she described that during surgeries Lauster “had very childlike behavior,” “[h]e didn’t always pay attention,” “his work performance was less than satisfactory,” he had to be directed by coworkers to pay attention and that Dr. Mohindra was asking him to do something, “[h]is main focus wasn’t on the procedure,” “[h]e would draw on the table with markers or saline,” and “[h]e would go up to the nurse monitoring the patient, or any other unscrubbed people in the room and poke their shoulder, almost like a child trying to – like a toddler, ‘Hey, I am touching you.’” (Tr. at 378:17-379:20.) Hunter explained that Lauster exhibited these types of behavior daily when she worked with him. (Tr. at 379:21-24, 388:3-10.) Lauster’s behavior annoyed her and was cumbersome and distracting to her own job duties. (Tr. at 380:3-13.) She testified that no one else at CSSC exhibited these types of behaviors. (Tr. at 380:14-17.) Hunter reported Lauster’s behavior to Ehret several times. (Tr. at 379:25-380:2.)

Another coworker, Danielle Mohindra (“Mohindra”), has worked at CSSC since June 2019 as an IR Tech, and she was promoted to Lead IR Tech in January 2020. (Tr. at 404:11-405:1.) Mohindra worked alongside Lauster as an IR Tech and as a Lead IR Tech. (Tr. at 416:22-417:2.) She described his work performance as “below average,” “very forgetful,” “[h]e would not be

focused,” Dr. Mohindra “would have to repeat himself numerous times,” Lauster “would drop supplies,” and “[h]e would draw pictures, doodle on the scrub tray while scrubbed in and [was] not paying attention to what was being performed.” (Tr. at 417:3-17.) She witnessed this type of behavior from Lauster on a daily basis. (Tr. at 463:19-23.) Dr. Mohindra complained to her that Lauster was inattentive during procedures, that he had to repeat requests to him, and that he dropped instruments on the floor. (Tr. at 437:16-438:2.) Mohindra communicated with Lauster regarding these performance issues multiple times, specifically asking if he was okay because he seemed so distracted, and he would respond that he was fine. (Tr. at 417:18-418:5.) Though these conversations mainly stayed between Lauster and herself, she occasionally discussed them with Ehret and Lozano. (Tr. at 418:6-13.) She also told Ehret that Lauster could not memorize tray setups and where the C-Arm needed to be positioned during procedures. (Tr. at 462:22-463:9.)

Yet another coworker, Lozano, began working as an IR Tech at CSSC in mid-2018 and was promoted to Lead IR Tech in January 2020. (Tr. at 482:17-483:5.) In this capacity, Lozano worked with Lauster regularly. (Tr. at 492:7-13.) She explained that she liked working with Lauster, but that “[h]e would joke around,” “[h]e would draw on the tray,” “[h]e would drop equipment,” “he seemed to be kind of in a different place than what the rest of us were,” “[h]e wasn’t focused on the procedure or the patient,” “[h]e liked to talk a lot,” Dr. Mohindra had to repeat instructions to Lauster, and “he had issues sometimes trying to get the equipment in place.” (Tr. at 492:14-494:4.) Lozano spoke with Lauster about his behavior and performance problems, but he didn’t really know what was going on at times. (Tr. at 494:5-17.) Lozano explained that Dr. Mohindra was also “continually concerned about [Lauster’s] habits” such as not paying attention or not knowing what was going on during surgery and that Dr. Mohindra expressed a lack of confidence in Lauster. (Tr. at 495:12-22.) Lozano reported Lauster’s performance and behavior issues to Ehret, such as Lauster setting up a room incorrectly, not focusing during procedures, and

Dr. Mohindra's frustration with Lauster. (Tr. at 496:13-20.) Lozano confirmed that toward the end of Lauster's employment at CSSC his performance declined. (Tr. at 499:13-19.)

Cassandra Shepard ("Shepard") (called by the General Counsel) worked with Lauster for the duration of his employment at CSSC. (Tr. at 282:20-283:5.) She observed that during surgeries Lauster "likes to chat too much" and that it distracted her during the procedure. (Tr. at 284:10-285:5.)

Ehret confirmed that throughout the duration of Lauster's employment, he received feedback from Dr. Mohindra, Lozano, Mohindra, and Hunter regarding Lauster's performance, such as frustration with him not learning procedures, not paying attention during surgeries, having to repeat directives to Lauster, dropping instruments, doodling on the back table, and not anticipating the physician's needs. (Tr. at 554:3-556:23.) Ehret talked with Lauster regarding these issues several times during his employment with CSSC. (Tr. at 557:2-21.) For example, Ehret told Lauster that he was not scheduled for more challenging surgeries because Dr. Mohindra and the Lead IR Techs reported Lauster's failure to pay attention, dropping wires, and not anticipating the surgeon's needs. (Tr. at 57:13-24.)

D. November 5, 2020 Meeting

On November 5, 2020, the interventional radiology staff and Dr. Mohindra held a staff meeting to discuss primarily inventory control concerns and general inventory issues. (Tr. at 118:3-17, 174:15-117.) The second to last item on the meeting agenda for that day stated: "6. Tech to run C-Arm in OR: – Brandon would like us to rotate into OR when C-arm is needed during working hours. Chelsy will run C-Arm (early) cases. – No one should be in breakroom when C-Arm is in use in OR. 1 Tech must go." (Tr. at 33:20-25, GC Ex. 4.) Mohindra, who created the agenda, explained that "run C-Arm" meant the nurse would push the C-Arm from its storage location to the operating room to get it ready for use. (Tr. at 432:22-433:4.) Ehret wanted this portion added

to the agenda because there were situations where IR Techs were in the breakroom rather than in the operating rooms helping with the C-Arm. (Tr. at 47:5-16, 179:8-14.) Specifically, instead of going to the breakroom and waiting for one of Dr. Mohindra's cases to start, IR Techs should check on the other surgeries to see if they needed help from an IR Tech. (Tr. at 431:25-432:17.)

One of the IR Tech's in attendance at the meeting, Shepard, made an audio recording of the meeting so she would have her own record of how to handle the inventory issues. (Tr. at 232:2-21.) During the meeting, the following conversation regarding operation of the C-Arm occurred:

(Danielle Mohindra) One thing that Brandon uh talked about, he wanted me uh to tell you guys, is whenever there's this uhh an OR case that requires a c-arm during the times that you're here, um there needs to be one tech that's in there. We can rotate whoever that is every day every week how often doesn't have to be the same tech every time. If the case starts super early, then Chelsea will run it for us but during the hours that we are scheduled to be here one of us have to be over there.

(Amber Rollins) So like today

(Danielle Mohindra) mhm

(Amber Rollins) They need one at five they scheduled one at five. Our hours are, I think the latest person scheduled is at four that leaves at four so what happens?

(Danielle Mohindra) Is Chelsea, is Chelsea here?

(Amber Rollins) I don't know.

(Jenny Lozano) Chelsea is here

(Danielle Mohindra) Ok...

(Amber Rollins) but I don't.

(Dr. Mohindra) is she allowed to work the C-arm?

(Danielle Mohindra) Yeah

(Martin Lauster) No.

(Danielle Mohindra: First Female voice) No?

(Martin Lauster) She's an RN

(Amber Rollins: Second Female voice) she's...they're technically not supposed to push the button but

(chattering in background) **(Martin Lauster: An RT is the only one who go by the . . .** (Amber Rollins and Danielle Mohindra begin talking over Martin Lauster so you can't make out the end of the sentence).

(Amber Rollins) If you position the foot pedal

(Danielle Mohindra) Ok, well that's what he said

(background chattering includes) Ok Brandon said that... (Nick Smith) in background says "nurse after")

(Cassandra Shepard) Nurses can be certified to do fluoroscopy though

(Dr. Mohindra) it's a stupid rule, but it is a rule

(Amber Rollins) It is a...it's a law

(Dr. Mohindra) It's probably a law

(Amber Rollins) It's prosecutable by law

(Dr. Mohindra) But it's a law because they lobbied it, you know but it... it doesn't take a couple of years of school necessarily.

(Amber Rollins: female) Well, there has to be a licensed tech in the building for somebody to...

(Dr. Mohindra) You can't have it both ways, I mean look

(Jenny Lozano)...So I was gonna say if that's the case then be prepared we're all gonna have to start coming in early for Julian's cases and just because it says six on the schedule that means five thirty start. So you're gonna start being here at 5 and were gonna have to start staying late so you know before we go down this rabbit hole I'm just pointing it out that

(background chattering)

(Cassandra Shepard) there's no way I can do that

(Dr. Mohindra) and I'm pushing back to because I...

(Amber Rollins) I mean I'm not saying that I'm I'm just saying if you wanna go by law that...

(Dr. Mohindra) I don't I don't I don't necessarily care but when I have 12 cases on the board. They say yes that his case and I lose the c-arm in the middle of my day when I already had cases, there's no, there's no, and that's another reason you know why this divorce is gonna be happening because I'm fucking done with it. I've earned the right to have two c-arms at my disposal five days a week and that's not what's happening. So I'm willing to put in more pressure on them to start moving his cases in the morning or his cases a little bit after that we're done because it fucks up our day pretty bad, ummm you know they don't, sometimes he they use that c-arm for ten minutes and other times I've watched that c-arm for an hour and a half and they haven't even started their case you know that happened two weeks ago I..., I..., I... looked in there, the anesthesiologist wasn't in there, no staff was in there and we'd already done three cases out of one room and yet two hours behind and they hadn'tThey took our c-arm too early. So anyway Brandon said he's gonna get another c-arm so just stay on him about that by the way guys if you ever see him again.

(Martin Lauster) Why does he need a full size c-arm why can't he get the ortho c-arm?

(Cassandra Shepard) Yeah for the many...

(Dr. Mohindra) Because we have a piece of shit c-arm that doesn't have a monitor on it and I want them to take that one and I wanna...

(Martin Lauster) But I mean if if they had a a ortho ahh it's just work station with little mini c on it

(Dr. Mohindra: male) You're not hearing me, we have dinosaur c-arm that is like three miles too old (lots of chatter) so I'm taking this growth as an opportunity for us to upgrade our second c-arm

(Martin Lauster) Oh, to give them that

(Dr. Mohindra) Yeah, so we'll, we'll, we'll give them the dinosaur from the last millennium, ah, cuz it's like a 1998 model or some... some... something like that, you know and um uh we will do a little upgrading but he had verbally said he is going to change it so I would say, I would stay on him about that and another thing to what you you guys don't have to stay late. If scheduled cases change right in the middle of the day I will spare one of you guys for whatever they need to do but

(Martin Lauster) That'll be perfect

(Dr. Mohindra) it doesn't make our day go off sideways
(Danielle Mohindra) Jenny and I will clarify the late day c-arm cases, but for the
hours that you are here one tech needs to be in there
....

(GC Ex. 10(c)) (emphasis added to reflect Lauster's comments).

Lauster claims that during this meeting he also stated that nurses operating the C-Arm was illegal, but for some reason that could not be heard on the recording. (Tr. at 182:20-183:1.)² Lauster confirmed that he had no further discussion regarding the use of the C-Arm after this meeting. (Tr. at 184:21-24.) IR Techs Shepard and Rollins, along with Lead IR Techs Lozano and Mohindra, all participated in the C-Arm discussion during this meeting. IR Tech Rollins in particular clearly stated her belief that nurses are not allowed to push the button on the C-Arm and that the rules regarding C-Arm operation are "prosecutable by law." (Tr. at GC Ex. 10(c).) Rollins has not been disciplined in any way by CSSC, nor have Shepard, Lozano, or Mohindra. (Tr. at 183:22-184:20.)³

Ehret was not present at this November 5, 2020 meeting. (Tr. at 35:12-13.) After the meeting, Mohindra and Lozano did not report anything Lauster said to Ehret. (Tr. at 437:9-15, 520:20-23.) Lauster confirmed that he never discussed the C-Arm topic with Ehret, that he has no personal knowledge of what Lozano or Mohindra told Ehret regarding the meeting, and that he has no personal knowledge regarding whether Ehret knew what was said during the November 5 meeting. (Tr. at 169:13-16, 185:22-24, 189:22-190:2.)

² Lauster claims that at some point in time before the November 5, 2020 meeting, he raised concerns about improper use of the C-Arm with IR Techs Michelle Lansford and Dawn Bacon, as well as Genovese, Mohindra, and Lozano. (Tr. at 114:4-8, 124:2-8.) When asked, "Did you ever bring any formal complaint to anyone at Capitol Street about the operation of the C-[Arm]," he conceded, "Other than in that [November 5] meeting, no." (Tr. at 202:20-22.) Neither Lozano nor Mohindra recalled any conversations with Lauster regarding the C-Arm prior to the November 5 meeting (Tr. at 435:16-23, 510:20-23), and Genovese, who also testified at the hearing, did not corroborate any such statements. Importantly, the alleged protected concerted activity upon which the General Counsel bases her Complaint is solely Lauster's statements in the November 5, 2020 meeting. (*See* Complaint, ¶ 4.)

³ Before she listened to the recording, Mohindra did not recall any discussion regarding who was allowed to operate the C-Arm during the November 5 meeting, and she provided an affidavit to the Region to that effect. (Tr. at 451:18-454:8, 472:17-22.) After listening to the recording, however, she recalled this discussion in more detail and testified about her recollection of the C-Arm discussion during the meeting. (Tr. at 454:9-455:4).

E. CSSC Discharges Lauster on November 18, 2020

About two weeks after this meeting, on November 18, 2020, Lead IR Tech Lozano was working a surgery alongside Lauster, Genovese, Nurse Leyda Feliu (“Feliu”), and Dr. Mohindra. (Tr. at 501:4-502:10.) Lozano was scrubbed in to assist Dr. Mohindra, Lauster was operating the C-Arm, Feliu was monitoring patient vitals, and Genovese was circulating. (Tr. at 127:13-128:22, 337:22-338:7) Lead IR Tech Mohindra entered the room as a second circulator after the surgery had already started. (Tr. at 419:6-420:6, 423:14-17.) During the procedure, Lozano looked up and saw Lauster making hand puppets on the wall in the shape of animal figures with the emergency flashlight. (Tr. at 502:11-503:5, 541:9-24.) He made these hand puppets on the wall for approximately two minutes. (Tr. at 545:21-24.) Lozano explained that Mohindra had to step in and run the C-Arm while Lauster was busy with his hand puppets. (Tr. at 503:6-15.)

Mohindra confirmed that she arrived in the operating room after the procedure started to serve as an extra circulator. (Tr. at 419:6-420:6, 423:14-17.) Mohindra explained that she saw Lauster take the emergency flashlight off the wall and playfully shine it into Feliu’s eyes. Feliu told him to stop, put it back, and he did. (Tr. at 420:7-421:16.) Mohindra confirmed that at no point in time did Lauster hand the flashlight to Feliu. (Tr. at 424:11-16.) Mohindra also testified that there was no clinical reason for Lauster to be handling the flashlight during the procedure. (Tr. at 424:5-10.)

Feliu (called as a witness by the General Counsel) corroborated these events. She testified that “I sent [Lauster] to go get [the flashlight], turn it on, and point towards me so I can see if it is working or not. And he did it. He go, turn on the flashlight.” (Tr. at 308:6-25.) When Lauster turned the flashlight on, Feliu explained she needed to see for herself that it was working, so Lauster “pointed it on me and then put it back on the wall.” (Tr. at 311:12-19.) Feliu explained that when she gestured to Lauster to show her the light so that she could see for herself that it was

working, she pointed at her eyes with her finger. (Tr. at 312:10-313:10.) She confirmed that Lauster did not hand her the flashlight at any point in time during this incident. (Tr. at 321:3-9.) Feliu was the nurse monitoring the sedated patient's vitals during this procedure, and she explained that to perform her job duties she needed to be focused on the patient, what the doctoring was doing, and what other staff were doing, all at the same time. (Tr. at 316:1-17.)

In a separate incident later that day, Lozano observed that Lauster setup a tray for another procedure completely backwards, which she discovered after the patient was already on the table. (Tr. at 503:16-504:10.) Lozano then reported the hand puppet incident and tray setup error to Ehret. (Tr. at 504:15-22.) Ehret confirmed that Lozano reported to him that Lauster again set up the operating room incorrectly and that he made shadow puppets on the operating room wall during a surgery. (Tr. at 82:11-25.) Ehret directed Lozano to tell Lauster to report to his office. (Tr. at 86:13-87:3.) At this point, Ehret had made up his mind that he was going to terminate Lauster's employment. (Tr. at 91:6-13.) Minutes later, before Lauster reported to Ehret's office, Mohindra and Ehret both testified that Mohindra reported to Ehret that Lauster shined a flashlight into nurse Feliu's eyes during a surgery. (Tr. at 80: 23-81:11, 86:4-21, 424:20-425:11.) Ehret asked Mohindra to document the flashlight incident on an employee write up form evidencing his violation of the company's safety rules. (Tr. at 91:14-24, GC Ex. 6.) Mohindra drafted the contents of the November 18, 2020 write-up, and she confirmed it accurately reflected what she witnessed. (Tr. at 426:6-427:10, GC Ex. 6.)

Ehret terminated Lauster's employment that same afternoon, and during his exit interview, Ehret discussed with Lauster his lack of progress, lack of improvement, and the digression in his skills. (Tr. at 63:2-4, 94:1-14.) Ehret explained that Lauster's termination was not solely due to the events on November 18, 2020, but rather, was a combination of everything leading up to that day, including him: not focusing/being distracted during surgeries; Dr. Mohindra having to repeat

requests during procedures; extra chatting during surgeries; failing to learn the room setups for each procedure or setting up the room incorrectly; drawing figures with a marker or saline solution on the surgery table; dropping surgical instruments; making shadow puppets on the wall during a procedure; taking the emergency flashlight off the wall during a surgery and shining it in the monitoring nurse's eyes; and falling asleep during meetings and in the nurses' office. (Tr. at 63:11-66:4, 68:8-69:1, 562:15-563:23.) These performance issues were all previously reported to Ehret by Dr. Mohindra, Lozano, Hunter, and Mohindra multiple times throughout the duration of Lauster's employment at CSSC. (Tr. at 577:8-585:10.) Prior to his discharge, Ehret provided Lauster with verbal warnings related to these issues, hoping it would be sufficient to cure the behavior. (Tr. at 79:4-7.) Indeed, the reason Ehret did not fire Lauster sooner is because he hoped his performance would improve, but instead, it declined. (Tr. at 590:7-21.) The reports he received from Lozano and Mohindra on November 18 were simply "the straw that broke the camel's back." (Tr. at 84:2-4.)

Ehret testified that at the time of Lauster's termination, he had no knowledge of conversations that occurred during the November 5, 2020 meeting related to the C-Arm. (Tr. at 567:12-16.) That is because after the November 5 meeting, nobody reported back to him regarding any discussion of the C-Arm or any statement made by Lauster. (Tr. at 569:1-7.) Ehret confirmed that at no point during Lauster's employment with CSSC did he hear about any complaint from Lauster regarding use of the C-Arm or any regulatory compliance issue for that matter. (Tr. at 569:8-12, 572:8-16.) As such, Ehret had no animus towards Lauster because of any such alleged complaint and no reason to take any action against him on this basis at all. (Tr. at 572:17-20.) Lozano and Mohindra both confirmed that nothing Lauster said during the November 5 meeting had anything to do with what they reported to Ehret on November 18, 2020. (Tr. at 435:12-15,

510:24-511:2.) Lauster conceded that nobody ever told him he was terminated because his conversations pertaining to use of the C-Arm. (Tr. at 186:25-187:8.)

i. Lauster's Version of Events

Lauster claims that Ehret, Mohindra, Lozano, Hunter, Harbert, Dr. Mohindra, and even General Counsel's own witnesses, Genovese and Shepard, are all wrong – that he was an exemplary employee who never engaged in *any* of the behaviors described by these witnesses. (Tr. at 136:3-137:10, 169:2-8, 596:6-597:19.) As it relates to his job performance for the duration of his employment at CSSC, Lauster claims that no staff or doctor told him he had *any* performance issues. (Tr. at 161:2-162:21, 596:6-597:19.) In fact, Lauster claims that at no point in time during his employment at CSSC did he have any understanding that he had any performance issues at all. (Tr. at 597:20-24.)

As it relates to the day of his termination, November 18, 2020, Lauster claims that Feliu asked him to retrieve the flashlight from the wall, and that he did so because she told him she is in charge of that equipment, needed to know if it worked since it had been broken for two months, and that CSSC got a new flashlight recently. (Tr. at 129:6-18.) He proceeded to grab the flashlight from the wall, Feliu asked him to shine it her way *but it did not come on, so he walked it over to her*. (Tr. at 130:24-6.) He then explained that "I handed it to her. She looked at it. She couldn't get it to go on immediately, and then she did. And she goes: See, it is the new one. I go oh, okay." (Tr. at 132:8-11.) Lauster claims that Feliu gave it back to him, and he put it back on the wall. (Tr. at 132:12-14.) *Lauster provided an affidavit under oath to the National Labor Relation Board regarding this matter, and he acknowledged that his testimony during the trial expressly contradicted his affidavit because in his affidavit he claimed that he – not Feliu – turned the flashlight on.* (Tr. at 166:5-17.) In fact, his affidavit corroborates Mohindra and Feliu's version of

the events, namely that Lauster shined the flashlight towards Feliu but did not hand it to her. (Tr. at 311:12-19, 321:3-9, 420:7-421:16.)

Genovese, who was in the room during the flashlight incident, also provided an affidavit under oath to the NLRB. (Tr. at 352:16-353:6.) ***Genovese confirmed that in her affidavit she did not state that Lauster walked the flashlight over and handed it to Feliu.*** (Tr. at 353:7-354:7.) ***Like Lauster, it was not until the trial that she contradicted her affidavit by claiming that Lauster could not get the flashlight to turn on so he handed it to Feliu.*** (Tr. at 339:1-14, 346:19-347:11.) Genovese conceded that after she submitted her affidavit, but before the trial, Lauster contacted her and told her his version of the flashlight incident, and that she understood her prior affidavit now conflicted with her testimony during the hearing. (Tr. at 345:20-346:5, 353:7-354:7.)

There are other minor discrepancies regarding the events on November 18, 2020 that simply do not affect witness credibility. For example, Lauster and Feliu believe the surgery in question was a fistulogram (Tr. at 127:1-16, 305:16-23), Mohindra and Lozano believe it was a declot (Tr. at 419:2-5, 500:15-502:25), and Genovese thought it could have been a fistulogram or a declot. (Tr. at 336:17-24, 350:9-14.) Lauster and Feliu claim Mohindra was not in the room during the flashlight incident (Tr. at 125:16-17, 321:18-322:10), Lozano and Mohindra claim she was present (Tr. at 421:8-422:6, 502:7-10), and Genovese stated Mohindra may have been in the room. (Tr. at 349:5-350:4.) Regardless, Lauster conceded that Mohindra would float from room to room to make sure staff had everything they needed, which corroborates her testimony that she came into the room after the procedure started. (Tr. at 190:25-191:5.)

F. Allegedly Similarly Situated Employees

CSSC discharged nurse Lacey Richardson on December 6, 2019 for setting off security alarms, failing to retain and improve her skills in the RN position, and continually forgetting information. (Tr. at 95:8-12, 104:5-15, GC Exs. 7, 12.) CSSC also discharged nurse Melania James

on January 16, 2020 for bringing the wrong patient into surgery multiple times. (Tr. at 98:7-13, 104:5-15, GC Exs. 7, 12.) Ehret confirmed that, like Lauster, neither of these employees who were discharged for performance issues received any written warning prior to the date of their termination. (Tr. at 569:23-571:19.)

G. After Lauster's Termination

i. The *Johnnie's Poultry* Claim

Ehret learned that Shepard recorded the November 5, 2020 meeting, and on or about January 28, 2021, he requested that she provide him a copy of the recording. (Tr. at 35:19-36-6.) Ehret explained that "I asked if there was a recording of the meeting, if she recorded the meeting after I received these papers, and she said yes. And I said, 'Would you mind giving that to me', and she said, 'Not at all.'" (Tr. at 36:11-18.) When asked if Ehret informed Shepard of Lauster's NLRB charge before requesting the information, he stated "I do not recall." (Tr. at 36:19-20.) She then simply emailed him the recording that same day. (Tr. at 36:21-23, 38:11-23, GC Ex. 11.)

As it relates to this same interaction, Shepard testified that Ehret asked if she remembered the November 5 meeting, she said "[n]o, but I have it recorded," he asked if she would mind sending it to him, and she said of course. (Tr. at 237:14-25.) Shepard claims Ehret did not say why he wanted the recording, and she did not ask. (Tr. at 238:1-21.) She testified that this conversation did not make her feel threatened or coerced in any manner. (Tr. at 287:12-19.) Shepard further testified that Ehret "is the greatest supervisor that I have ever had." (Tr. at 281:19-22.) She explained that he is "completely and utterly patient," "very giving," "very easy to talk to," "has an open door policy," "he has been very good to me, and I know to others," he is "extremely fair," and she has "never seen him treat anybody terribly." (Tr. at 281:19-282:19.) She has never felt intimidated or coerced by him. (Tr. at 282:6-15.)

Based upon this testimony, the General Counsel orally amended her Complaint during the trial to include a *Johnnie's Poultry* claim, alleging that on or about January 28, 2021, Ehret “forcefully interrogated Shepard about Lauster’s unfair labor practice proceeding without providing the *Johnnie's Poultry* safeguards.” (Tr. at 271:25-272:11.)

ii. The Indiana State Department of Health Audit

The Indiana State Department of Health (“DOH”) audits CSSC annually for regulatory compliance. (Tr. at 509:6-17, 552:20-24.) After his discharge Lauster filed a complaint with the DOH regarding use of the C-Arm, and Lozano communicated with the DOH regarding this complaint. (Tr. at 187:2-30, 509:24-510:11.) The DOH did not find any infractions (Tr. at 509:24-510:11), and in fact, CSSC has never been cited for any infractions or compliance issues related to operation of the C-Arm. (Tr. at 509:18-23, 552:25-553:7.)

III. ARGUMENT

The General Counsel’s Complaint proffers two Section 8(a)(1) claims. ***First***, she alleges that Lauster was discharged by CSSC on November 18, 2020 because he engaged in protected concerted activity during the November 5, 2020 meeting “by raising concerns that [CSSC]’s instructions regarding operation of the x-ray equipment were in violation of the law.” (Complaint, ¶ 4.) ***Second***, she alleges that CSSC violated the *Johnnie's Poultry* safeguards when Ehret requested the recording of the November 5 meeting from Shepard on January 28, 2021. (Amended Complaint, ¶ 4(d).) Related to the first of these claims is the General Counsel’s contention that Mohindra and Lozano, who led the November 5 meeting, are Section 2(11) supervisors under the Act. (Complaint, ¶ 3.)

With respect to the first claim, CSSC contends that the General Counsel has not met her burden to prove that Mohindra and Lozano are Section 2(11) supervisors, nor has she established that Lauster engaged in protected concerted activity when he stated during the November 5, 2020

meeting that nurses are not allowed to operate the C-Arm. But even if she could meet her burden on these elements, it is all for naught because *she unequivocally failed to establish that Lauster was discharged because of the comments he made during the November 5 meeting about the C-Arm operation*. Beyond raw speculation and conjecture, there is no evidence in the record linking Ehret's termination decision to Lauster's comments of which he was completely unaware, nor is there evidence that such comments prompted Mohindra and Lozano to manufacture lies about Lauster's conduct to induce Ehret to terminate his employment. Indeed, while there are some differences in the testimony about exactly what occurred with the emergency flashlight on Lauster's last day of employment, all the witnesses corroborated that he was manipulating it during a procedure. And numerous witnesses – including those called by the General Counsel – corroborated Lauster's regular pattern of inattentiveness and distracting behaviors during clinical procedures while patients were sedated on the operating table.

Similarly, the General Counsel has not met her burden of proof on the *Johnnie's Poultry* claim because these safeguards do not apply to the conversation between Ehret and Shepard that did not implicate her Section 7 rights. And even if they did, the totality of the circumstances do not warrant a finding of a *Johnnie's Poultry* violation.

A. The General Counsel has not met her burden to prove that CSSC discharged Lauster because of comments he made about who is authorized to operate the C-Arm in the November 5 meeting.

i. Applicable legal standard for Section 8(a)(1) discharges.

Section 7 of the Act guarantees employees “the right . . . to engage in other concerted activities for the purpose of . . . mutual aid or protection.” Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7.” Here, General Counsel alleges that CSSC violated Section 8(a)(1) by terminating Lauster's employment because he engaged in protected activity

under Section 7 when he discussed proper use of the C-Arm during the November 5, 2020 meeting. (See Complaint, ¶ 4.) The NLRB’s Supreme Court-approved standard for Section 8(a)(1) cases turning on employer motivation is found in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *see also NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis).

“In *Wright Line*, the Board determined that the General Counsel carries [her] burden by persuading by a ***preponderance of the evidence*** that employee protected conduct was ***a substantial or motivating factor*** (in whole or in part) for the employer’s adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole.” *Napleton 1050, Inc.*, 367 NLRB No. 6 (Sept. 28, 2018) (emphasis added) (citing *Wright Line*, 251 NLRB 1083). To establish her *prima facie* case showing that the adverse action was a “substantial or motivating factor,” the General Counsel must prove: (1) protected activity; (2) employer knowledge of the protected activity; and (3) ***anti-protected activity animus***. *Id.*; *see also Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984)). To satisfy this third element, the “General Counsel must establish a connection or nexus between the Respondent’s anti[protected activity] animus and the discharge; evidence of the Respondent’s general hostility toward [protected activity] is not sufficient, on its own, to prove discriminatory motivation.” *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (Nov. 22, 2019). “If, and only if, the General Counsel makes this initial showing, the burden shifts to the Respondent to establish that it would have discharged [charging party] for a legitimate, nondiscriminatory reason regardless of [charging party’s protected activity].” *Id.*; *see also Napleton 1050, Inc.*, 367 NLRB No. 6.

- ii. **The General Counsel's *prima facie* case fails because there is no evidence of any animus toward Lauster based upon his comments about C-Arm operation at the November 5 meeting or that such comments were in any way related to his termination for work performance issues.**

The General Counsel's *prima facie* claim fails from the start because she cannot satisfy the third element of her claim, anti-protected activity animus. *Napleton 1050, Inc.*, 367 NLRB No. 6; *see also Roure Bertrand Dupont, Inc.*, 271 NLRB 443. There is simply no direct or indirect evidence upon which the General Counsel can establish this element.

As it relates to direct evidence, Lauster conceded that nobody ever told him he was terminated because of his comments pertaining to use of the C-Arm. (Tr. at 186:25-187:8.) Indeed, he fails to point to any ambiguous statements or even actions that could in any way be interpreted as animus towards protected activity under the Act, and no witness presented any evidence that Ehret, Lozano, or Mohindra had any ill feelings toward him because of those comments. To the contrary, Lozano and Mohindra both testified that nothing Lauster said during the November 5 meeting had anything to do with what they reported to Ehret on November 18 (Tr. at 435:12-15, 510:24-511:2), and Ehret testified that he had no negative feelings towards Lauster because of any such alleged complaint and no reason to take any action against him on this basis at all. (Tr. at 572:17-20.)

With no direct evidence, the General Counsel must rely upon indirect or circumstantial evidence to create an inference of anti-protected activity animus. Yet all such circumstantial evidence favors CSSC, not Lauster. This conclusion becomes clear when analyzing the complete lack of connection between his modest comments during the meeting and eventual termination for poor performance and behavior.

Indeed, the totality of Lauster's contribution to the November 5, 2020 meeting regarding proper use of the C-Arm is as follows: "No." "She's an RN." "An RT is the only one who go by

the” (GC Ex. 10(c).)⁴ These are the three comments upon which the General Counsel’s entire Section 8(a)(1) claim is based (*see* Complaint, ¶ 4), as Lauster confirmed that he never discussed the C-Arm topic with Ehret (Tr. at 169:13-16, 185:22-24, 189:22-190:2), and that outside of the November 5 meeting, he never lobbied a complaint regarding use of the C-Arm. (Tr. at 202:20-22.) Ehret was not present at this meeting to hear these comments (Tr. at 35:12-13), and Mohindra and Lozano did not report anything Lauster said at the meeting to Ehret. (Tr. at 437:9-15, 520:20-23.) Further, at the time of Lauster’s discharge, Ehret had no knowledge of conversations that occurred during the meeting related to the C-Arm (Tr. at 567:12-16), and at no point during Lauster’s employment with CSSC did Ehret learn about any complaint he might have made about operation of the C-Arm or any other regulatory compliance issue. (Tr. at 569:8-12, 572:8-16.)

In short, the *only* evidence regarding animus is that no animus existed. With no direct or indirect evidence to create an inference of anti-protected activity animus, the General Counsel’s *prima facie* case fails and the analysis should end there. *Napleton 1050, Inc.*, 367 NLRB No. 6; *see also Roure Bertrand Dupont, Inc.*, 271 NLRB 443.

But even if the General Counsel could carry her burden to prove anti-protected activity animus, her *prima facie* case still fails because she must prove by a preponderance of the evidence ***a direct connection or nexus between this alleged animus and Lauster’s termination specifically.*** *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120. Indeed, “Respondent’s general hostility toward [protected activity] is not sufficient, on its own, to prove discriminatory motivation.” *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120. Again, there is nothing in the record of evidence to establish such a direct connection or nexus.

⁴ As noted, Lauster also testified that he made the comment that it would be illegal for a nurse to operate the C-Arm, even though that comment was not captured in the audio. (Tr. at 182:20-183:1.) Ironically, the one person who clearly did make that comment was IR Tech Amber Rollins, who was not subject to any adverse action whatsoever. (Tr. at 183:22-184:20, GC Ex. 10(c).)

Following a three-day hearing, the only evidence Lauster adduced to support his claim is his own speculation that he must have been terminated because he made comments about the C-Arm operation during an inventory meeting two weeks before his termination. (Tr. 186:4-20, 200:2-225.) But Lauster's pure speculation cannot support his unfair labor practice claim. *United Parcel Serv.*, 327 NLRB 317, 319 (1998) ("However, such speculation, even if reasonable, is no substitute for actual evidence.") Moreover, no other witness offered any evidence suggesting that the reason Lauster was discharged was because of his comments in the inventory meeting. With no evidence to establish anti-protected activity animus or a direct nexus between that animus and Lauster's termination, the General Counsel's *prima facie* claim fails as a matter of law. She cannot satisfy her burden, dooming the claim and failing to shift any burden upon CSSC to assert a defense. The analysis should end here.

- iii. Even if the General Counsel could satisfy her *prima facie* case, the claim still fails because CSSC would have discharged Lauster for the legitimate, nondiscriminatory reasons of his unsatisfactory job performance regardless of Lauster's protected activity, and there is no indication of pretext.**

Even if the General Counsel could meet her *prima facie* case, this claim still fails because CSSC satisfies its burden of showing it would have discharged Lauster for job performance issues, regardless of the comments he made about proper C-Arm use during the November 5, 2020 meeting. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 ("If, and only if, the General Counsel makes this initial showing, the burden shifts to the Respondent to establish that it would have discharged [charging party] for a legitimate, nondiscriminatory reason regardless of [charging party's protected activity].")

Throughout his employment with CSSC, Lauster's performance was characterized by distraction and inattentiveness during procedures, failure to learn protocols regarding procedure setup, needing to be reminded to do certain things by Dr. Mohindra, doodling on trays, and other similar behaviors. Despite repeated reminders from Ehret, Lozano, Mohindra, and others, and

notwithstanding Ehret's patient hope that Lauster's performance would improve over time, it actually got worst. His actions on November 18, 2020 were the proverbial "straw that broke the camel's back" leading to the inevitable termination of his employment. Here, the entire record of evidence, including General Counsel's own witnesses at trial, supports Ehret's testimony regarding the legitimate, nondiscriminatory reasons for Lauster's discharge. For example:

- Genovese testified that Lauster's 2019 evaluation specifically critiqued that "Marty needs to work on being more focused in the procedures by paying attention [and] anticipating the needs of the case [and] physician" (GC Ex. 5 at 2) and that she wrote this critique because Lauster was writing during surgeries and needed to be more attentive in procedures. (Tr. at 329:23-330:3, 330:21-331:4.)
- Lozano and Ehret confirmed that Lauster's performance continued to decline after this performance evaluation. (Tr. at 499:13-19, 590:7-21.)
- Shepard explained that during surgeries Lauster "likes to chat too much" and that it distracted her during the procedure. (Tr. at 284:10-285:5.)
- Harbert described Lauster's performance during surgeries as "distracted," "[h]e got off task easily," "[h]e would squirt the circulators with saline, draw on the table, talk to room staff and be generally distracting." (Tr. at 365:16-366:2.)
- Hunter explained that during surgeries Lauster "had very childlike behavior," "[h]e didn't always pay attention," "his work performance was less than satisfactory," he had to be directed by coworkers to pay attention and that Dr. Mohindra was asking him to do something, "[h]is main focus wasn't on the procedure," "[h]e would draw on the table with markers or saline," and "[h]e would go up to the nurse monitoring the patient, or any other unscrubbed people in the room and poke their shoulder, almost like a child trying to – like a toddler, 'Hey, I am touching you.'" (Tr. at 378:17-379:20.)
- Mohindra described Lauster's work performance as "below average," "very forgetful," "[h]e would not be focused," Dr. Mohindra "would have to repeat himself numerous times," Lauster "would drop supplies," "[h]e would draw pictures, doodle on the scrub tray while scrubbed in and [was] not paying attention to what was being performed" (Tr. at 417:3-17), and Lauster could not memorize tray setups and where the C-Arm needed to be positioned for each type of surgery. (Tr. at 462:22-463:9.)
- Lozano explained that she liked working with Lauster, but that "[h]e would joke around," "[h]e would draw on the tray," "[h]e would drop equipment," "he seemed to be kind of in a different place than what the rest of us were," "[h]e wasn't focused on the procedure or the patient," "[h]e liked to talk a lot," Dr. Mohindra had to repeat instructions to Lauster, "he had issues sometimes trying to get the equipment in place" (Tr. at 492:14-494:4), Dr. Mohindra was "continually concerned about his habits" such as not paying attention or not

knowing what was going on during surgery, and Dr. Mohindra had a lack of confidence in him. (Tr. at 495:12-22.)

- Dr. Mohindra complained to Lozano, Mohindra, and Ehret that Lauster lacked attentiveness, that he had to repeat requests to Lauster, that Lauster did not know what to do during surgeries, and that Lauster dropped instruments on the floor. (Tr. at 437:16-438:2, 495:12-19, 554:11-25.)
- Ehret confirmed that throughout Lauster's employment, he received feedback from staff and physicians regarding Lauster, such as frustration with him not learning procedures, not paying attention during surgeries, having to repeat directives, dropping instruments, doodling on the back table, and not anticipating physician needs. (Tr. at 554:3-556:23.)

As it relates to the date of his discharge, November 18, 2020:

- Lozano saw Lauster making hand puppets on the wall in the shape of animal figures with the emergency flashlight. (Tr. at 502:11-503:5, 541:9-24.)
- Mohindra explained that Lauster grabbed the emergency flashlight off the wall and shined it into monitoring nurse Feliu's eyes. (Tr. at 420:7-421:16.) Feliu corroborated these events and confirmed Lauster never handed the flashlight to her. (Tr. at 321:3-9.) Lauster's affidavit confirmed he shined the flashlight toward Feliu and that he did not hand it to her for her to turn on. (Tr. at 166:5-17.) Only during the trial did he change his testimony to claim he never got the flashlight to turn on, so he handed it to Feliu. (*Id.*) Similarly, Genovese provided an affidavit that never stated Lauster handed the flashlight to Feliu. (Tr. at 353:7-354:7.) Only at trial did her testimony change (and only after Lauster communicated to her before the trial his version of how the incident occurred.) (Tr. at 345:20-346:5, 353:7-354:7.)
- In a separate incident later that day, Lozano witnessed Lauster setup a tray for surgery completely backwards. (Tr. at 503:16-504:10.)
- Ehret testified that Lauster's termination was not solely due to the events on November 18, 2020, but rather, was a combination of everything leading up to that day, such as all of the previously cited work performance issues that were reported to him by Dr. Mohindra, Lozano, Hunter, and Mohindra multiple times throughout Lauster's employment. (Tr. at 577:8-585:10.)

This mountain of evidence – from numerous coworkers (including the General Counsel's own witnesses) who acknowledged his work performance and behavior issues, to Lauster's and Genovese's suspicious testimony regarding handing the flashlight to Feliu that is contradicted by their affidavits and Feliu's own testimony – supports the inevitable conclusion that CSSC terminated Lauster's employment for legitimate, non-discriminatory reasons relating to his work

performance that had nothing to do with his comments relating to proper use of the C-Arm. Having carried its burden of establishing a legitimate, nondiscriminatory reason for termination, CSSC has provided yet another, independently sufficient reason why General Counsel's claim must fail.

Importantly, there is no evidence of pretext to undermine CSSC's legitimate, non-discriminatory reason for termination. Multiple supervisors, nurses, Dr. Mohindra, and even the General Counsel's own witnesses during the trial corroborated these continued performance issues. And Ehret confirmed that Lauster was not terminated until November 18, 2020 because he hoped Lauster's performance would improve with verbal coaching, but it did not. (Tr. at 57:25-58:4, 63:2-4, 94:1-14, 590:7-21.)

Moreover, even if Mohindra and Lozano were mistaken in their observations about the flashlight incident on November 18 in that Lauster was actually trying to assist Feliu to determine whether the flashlight was working properly, rather than goofing around as he so often did during procedures, there is no evidence that Mohindra and Lozano were lying about what they told Ehret they had seen. Nor is there any evidence at all that Ehret did not believe that what they told him was true. As such, it is clear that Ehret discharged Lauster for legitimate, nondiscriminatory work-related concerns.

The fact that Lauster's write-up on November 18, 2020 does not include every reason for his termination does not establish pretext either. First, the write-up does not purport to be a termination document, but simply documents Mohindra's observations of Lauster's conduct related to the flashlight incident, as Mohindra was asked by Ehret to do. (Tr. at 91:14-24, GC Ex. 6.) Lauster was then verbally discharged by Ehret based upon all of his prior performance issues, including the flashlight incident. (Tr. at 577:8-585:10.) This has been Ehret's method and practice with all employees who have been discharged for poor performance or behavior. For example, CSSC previously discharged nurse Lacey Richardson (Tr. at 95:8-12, 104:5-15, GC Exs. 7, 12)

and nurse Melania James, for substandard job performance. (Tr. at 98:7-13, 104:5-15, GC Exs. 7, 12.) As with Lauster, neither of them received a prior written warning, and both of them were discharged on the same day as their write-up. (Tr. at 569:23-571:19, Exs. 7, 12.) In other words, no pretext exists because all employees were treated the same.

iv. The evidence overwhelmingly dictates against a finding that Lauster was discharged for engaging in protected activity.

The conclusion that the overwhelming evidence supports a decision in CSSC's favor becomes crystal clear when one considers what it would require to find in the General Counsel's favor. One would have to conclude that Ehret, Mohindra, Lozano, Hunter, Harbert, and even General Counsel's own witnesses Genovese and Shepard, *lied* about Lauster's history of performance issues. One would have to conclude that only Lauster was telling the truth about his unblemished performance – despite the fact that his affidavit under oath, and Genovese's affidavit under oath, expressly contradict their testimony at trial regarding the flashlight incident. One would then have to make the speculative leap between these lofty conclusions and somehow still conclude that the termination decision was “substantially motivated” by Lauster's modest comments about the C-Arm operation made two weeks prior during a meeting in which Ehret was not in attendance and about which he was not aware, even though several other employees also discussed the proper operations of the C-Arm, including Rollins who declared “[i]t's prosecutable by law,” and yet were not disciplined in any manner. (Tr. at 183:22:184:20, GC Ex. 10(c).) And it would require one to conclude that Ehret believed Mohindra's and Lozano's lies and then summarily discharged Lauster. Such is the stuff of speculative conspiracy theories, but it is neither rational nor reasonable, and it cannot pass muster in a formal legal proceeding before the NLRB.

B. The *Johnnie's Poultry* safeguards do not apply to the conversation between Ehret and Shepard, and even if they did, there is insufficient evidence to support a *Johnnie's Poultry* violation.

i. The *Johnnie's Poultry* safeguards do not apply to the brief interaction between Ehret and Shepard, dooming General Counsel's claim as a matter of law.

Mid-way through the hearing, the General Counsel orally amended the Complaint to include a *Johnnie's Poultry* claim, alleging that on or about January 28, 2021, Ehret ***forcefully interrogated*** Shepard about Lauster's unfair labor practice proceeding without providing the *Johnnie's Poultry* safeguards. (Tr. at 271:25-272:11.) In *Johnnie's Poultry*, 146 NLRB 770, 775 (1964), the Board held that an employer may interrogate employees about issues raised in a charge or complaint if it is necessary to prepare a defense for trial of the case, but only if certain safeguards are observed. Specifically, the employer must: communicate the purpose of the questioning to the employee; assure her that no reprisal will take place; and obtain her participation on a voluntary basis. *Id.*; *Pincus Elevator & Elec. Co. Respondent & Loc. 5, Int'l Union of Elevator Constructors Charging Party*, No. 4-CA-19400, 1992 WL 1465665 (Nov. 16, 1992).

These *Johnnie's Poultry* safeguards do not apply to every interaction between employer and employee, however. The safeguards are "applicable only to those situations that involved an employer's interrogation of employees ***about matters involving their Section 7 rights.***" *Safelite Glass*, 283 NLRB 929, 950 (1987) (NLRB affirming ALJ decision on this issue) (emphasis added). Here, the *Johnnie's Poultry* safeguards do not apply because Ehret did not interrogate Shepard "about matters involving [her] Section 7 rights." *Id.* Indeed, the entirety of the relevant testimony from Ehret and Shepard related to this interaction is as follows.

Ehret testified that he learned Shepard recorded the November 5, 2020 meeting, and on or about January 28, 2021, he requested that she send him a copy of the recording. (Tr. at 35:19-36:6.) Ehret specifically explained, "I asked if there was a recording of the meeting, if she recorded the meeting after I received these papers, and she said yes. And I said, 'Would you mind giving

that to me’, and she said, ‘Not at all.’” (Tr. at 36:11-18.) When asked if Ehret informed Shepard of the charge before requesting the information, he stated “I do not recall.” (Tr. at 36:19-20.) She then emailed him the recording that same day. (Tr. at 36:21-23, 38:11-23, GC Ex. 11.) Similarly, Shepard testified that Ehret “came up and said, ‘Hey, do you happen to remember the meeting,’ and I said, ‘No, but I have it recorded. I have no use for the recording but I have it,’ and he goes, ‘Oh. Would you mind sending it to me?’ I said, ‘Of course,’ and that was that interaction.” (Tr. at 237:14-25.) Shepard then stated that Ehret did not say why he wanted the recording, and she did not ask. (Tr. at 238:1-21.) This conversation did not make Shepard feel threatened or coerced in any manner. (Tr. at 287:12-19.) In fact, she testified that Ehret “is the greatest supervisor that I have ever had.” (Tr. at 281:19-22.) She explained that he is “completely and utterly patient,” “very giving,” “very easy to talk to,” “has an open door policy,” “he has been very good to me, and I know to others,” he is “extremely fair,” and she has “never seen him treat anybody terribly.” (Tr. at 281:19-282:19.) In fact, she has never felt intimidated or coerced by him. (Tr. at 282:6-15.)

This brief interaction does not trigger the necessity of the *Johnnie’s Poultry* safeguards because Ehret did not interrogate Shepard regarding her Section 7 rights. This is similar to the NLRB’s conclusion in *Safelite Glass*, where the NLRB affirmed the ALJ decision dismissing General Counsel’s *Johnnie’s Poultry* claim.

[I]t makes no sense to apply the *Johnnie’s Poultry* rules ***because the employees were not questioned about their union sympathies or activities or about any other activities guaranteed by Section 7 of the Act.*** Nor was their interrogation reasonably calculated to interfere with the Board’s statutory obligation to carry out the Act’s mandate to protect the employees’ Section 7 rights inasmuch as Respondent did not ask the employees if they had spoken to a Board agent or whether they had submitted affidavits to the Board. The employees were only asked to furnish a statement to Respondent’s attorney ***that would inform him of what had been stated to the employees by representatives of management and Respondent’s attorney during the meetings previously held by management, which the employees attended.*** This interrogation was not reasonably calculated to inhibit the employees from engaging in any of the types of protected concerted activity encompassed by Section 7 of the Act, nor was it reasonably calculated to interfere with the Board’s investigational and prosecutorial processes. In other words the

alleged illegal interrogation by Respondent's attorney in preparing a defense to Local 1621's unfair labor practice charge did not pertain to the employees' involvement in conduct protected by Section 7 of the Act. Accordingly, I shall recommend the dismissal of this allegation in the complaint."

Safelite Glass, 283 NLRB 929, 950 (emphasis added). If in *Safelite Glass* the *Johnnie's Poultries* safeguards were not needed because the employer merely asked for a statement from the employee about what she remembered from a meeting, then certainly here the safeguards are not required where the employer merely asked for a recording of the meeting. *See also Rossmore House*, 269 NLRB 1176, 1177 (1984) ("We conclude that *PPG* improperly established a per se rule that completely disregarded the circumstances surrounding an alleged interrogation and ignored the reality of the workplace. Such a per se approach had been rejected by the Board 30 years ago when it set forth the basic test for evaluating whether interrogations violate the Act: ***whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act [i.e. Section 7]***. Our view is consonant with that expressed by the Seventh Circuit Court of Appeals in *Midwest Stock Exchange v. NLRB*."") (emphasis added). The General Counsel for the NLRB has even released memoranda requiring this same conclusion. *See Subject: Ross Incineration Serv.*, No. Case 8-CA-36376, 2006 WL 5054726, at *1 (Sept. 27, 2006) (NLRB General Counsel Memoranda) ("We conclude the Employer did not violate Section 8(a)(1) because the Employer did not inquire into employees' Section 7 activity and, under the totality of the circumstances, the employee interviews were not coercive. . . . [T]he Board has made it clear that an employer preparing for a Board hearing or investigating an unfair labor practice charge that wishes to ask employees questions ***that inquire into matters involving Section 7 conduct*** must furnish employees with certain safeguards, which the Board set forth in *Johnnie's Poultry Co.* ***Where an employer's questions do not inquire into employees' Section 7 conduct, however, the requirement that these Johnnie's Poultry safeguards be given by the employer does not apply.***") (Emphasis added). Because the brief interaction between Ehret and Shepard did not relate to or

affect her rights under Section 7 of the Act, the *Johnnie's Poultry* claim fails as a matter of law because the safeguards are not required in this situation.

- ii. **Even if the *Johnnie's Poultry* safeguards were required, the General Counsel's claim still fails because the totality of the circumstances does not warrant a finding of a violation.**

Even if the *Johnnie's Poultry* safeguards were required, and they were not for the reasons discussed above, at best, General Counsel has alleged a technical violation of the safeguards. The claim should nonetheless be decided in CSSC's favor because finding a technical violation in this context is unwarranted where it would not serve the purpose of the claim. The purpose and heart of the *Johnnie's Poultry* safeguards are to protect employees from coercive conduct and retaliation. *Johnnie's Poultry*, 146 NLRB 770, 775; *Pincus Elevator & Elec. Co. Respondent & Loc. 5, Int'l Union of Elevator Constructors Charging Party*, No. 4-CA-19400, 1992 WL 1465665. Here, Shepard expressly testified that she did not feel coerced or threatened, and she was not retaliated against in any manner. Indeed, she called Ehret "the greatest supervisor that I have ever had." (Tr. at 281:19-22.) Where the purpose and foundation of the *Johnnie's Poultry* claim was not violated, there should be no technical violation. *See Active Products Corporation*, 242 NLRB 325, 334 (1979) (*per se* approach to *Johnnie's Poultry* violations not warranted where it was a single incident in a non-coercive environment); *see also Bill Scott Oldsmobile*, 282 NLRB 1073, 1076 (1987) (dissenting) ("I would find a violation in such a context only when the totality of the evidence indicates that the interview amounted to coercive conduct.")

Indeed, Circuit Courts (including the Seventh Circuit within which CSSC is located) around the nation have recently begun to scrutinize and admonish the NLRB's *per se*, blanket approach to technical *Johnnie's Poultry* violations. The NLRB noticed this scrutiny, and it appears to be reconsidering its position on the issue. *See Sunbelt Rentals, Inc. & Int'l Union of Operating Engineers Loc. 139, Afl-Cio*, 370 NLRB No. 94 (Mar. 1, 2021) (requesting that the parties and

amicus participants submit briefs regarding whether *Johnnie’s Poultry* should be overruled, and stating:

[T]he Respondent asks the Board not to apply *Johnnie’s Poultry* and instead consider “the totality of the circumstances, including the purpose of the interview, the entire statement made to the employee, and the scope of the questioning.” The Respondent argues that there would be no violation under this standard because the employees “made it clear that they knew there would be no repercussions.” Since we are not free to decline to apply controlling precedent, we construe the Respondent’s exceptions as contending that *Johnnie’s Poultry* should be overruled. The Respondent is not alone in this. Although the *per se* standard of *Johnnie’s Poultry* is longstanding and has provided useful bright-line guidance for employee interviews, several courts of appeals have disagreed with it. *See Tschiggfrie Properties, Ltd. v. NLRB*, 896 F.3d 880, 888 (8th Cir. 2018) (rejecting *Johnnie’s Poultry* and citing cases in which the Second, Fifth, and Seventh Circuits have done likewise). Although the Board adheres to its nonacquiescence policy with respect to circuit court decisions that conflict with Board law, the value of a clear and predictable standard is called into question when multiple appellate courts decline to apply it and themselves apply varying standards.)

See also A & R Transp., Inc. v. N.L.R.B., 601 F.2d 311, 312–13 (7th Cir. 1979) (stating:

[T]he Board’s position [is] that failure to adhere strictly to the rules set forth in *Johnnie’s Poultry* constitutes a *Per se* violation of § 8(a)(1). That position . . . has not been adopted by the courts, however. The Eighth Circuit denied enforcement of the Board’s order in *Johnnie’s Poultry* itself, holding that the Board’s determination that the interrogation was coercive was not supported by the evidence. Although the court did not question the interrogation rules enunciated by the Board, it set aside the order even though, apparently the interviewed employees were not specifically informed that they could refuse to consent to the interview. The Second Circuit has not followed *Johnnie’s Poultry* and employs its own “totality of the circumstances” test for coercion. *N. L. R. B. v. Monroe Tube Co.*, 545 F.2d 1320, 1328 & n. 16 (2d Cir. 1976). The Fifth and Sixth Circuits have approved the interrogation rules set forth in *Johnnie’s Poultry* without employing a *Per se* rule. *N. L. R. B. v. Neuhoff Bros., Packers, Inc.*, 375 F.2d 372, 378 (5th Cir. 1967); *Montgomery Ward & Co. v. N. L. R. B.*, 377 F.2d 452, 456 (6th Cir. 1967). The D.C. Circuit has applied the interrogation rules of *Johnnie’s Poultry* but does not seem to have adopted a *Per se* approach. *International Union, United Automobile, Aerospace and Agricultural Implement Workers v. N. L. R. B.*, 129 U.S.App.D.C. 196, 204, 392 F.2d 801, 809 (1967), *Cert. denied*, 392 U.S. 906, 88 S.Ct. 2058, 20 L.Ed.2d 1364 (1968). The interrogation standards set forth in *Johnnie’s Poultry* are relevant in determining whether an interview was coercive and thus violative of § 8(a)(1). We join with other circuits, however, in declining to approve a *Per se* rule and instead will look to the totality of the circumstances, including the purpose of the interview, the entire statement made to the employee, and the scope of the questioning. Here those circumstances indicate a lack of

coercion. That conclusion is not altered by the omission the ALJ and the Board found fatal or the presence of an officer of the employer at the interview.)

In sum, the General Counsel failed to carry her burden on the *Johnnie's Poultry* claim, as the testimony on this topic about Ehret's and Shepard's brief conversation does not trigger the necessity of the safeguards in the first place. Regardless, the claim should fail because a violation is not warranted under these circumstances, especially given Circuit Courts' and NLRB's admonishment of the *per se* application of this technical rule.

IV. CONCLUSION

For the foregoing reasons, CSSC respectfully requests that the Judge render a decision in CSSC's favor on both of the alleged unfair labor practices.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the National Labor Relations Board and has been served upon the following, by first-class, United States mail, postage prepaid, this 19th day of August, 2021:

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